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In The

Supreme Court of the United States

October Term, 1995

THE STATE OF OKLAHOMA,

Petitioner,

vs.

PONCA TRIBE OF OKLAHOMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

INTRODUCTION:

On March 27, 1996 this Court entered its decision in *Seminole Tribe of Florida v. Florida*, No. 94-12 (March 27, 1996). Therein, this Court held that Congress did not have the power under the United States Constitution, pursuant to its plenary authority over Indian commerce, to abrogate the States' Eleventh Amendment sovereign immunity. As a result, this Court impliedly, if not actually, further held that Congress' clearly intended attempt to abrogate the States' Eleventh Amendment sovereign immunity and thereby make the States subject to the jurisdiction of the federal courts in suits brought by Indian Tribes under the Indian Gaming Regulatory Act, 25 U.S.C. §2701 *et seq.* ("IGRA"), was unconstitutional.

Currently pending before this Court is the petition for a writ of certiorari of Petitioner State of Oklahoma from the decision in *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994). Therein, the Tenth Circuit held that Congress did have the power to abrogate the States' sovereign immunity in suits brought by the Indian Tribes under IGRA. Pursuant to Rule 15.8, Respondent Ponca Tribe submits this supplemental brief to discuss the impact of the Court's decision in *Seminole Tribe* on Petitioner Oklahoma's pending petition for a writ of certiorari.

This Court's decision in *Seminole Tribe* has answered the question of the applicability of the Eleventh Amendment to the suit brought by the Ponca Tribe pursuant to §2710(d)(7) of IGRA, 25 U.S.C. §2710(d)(7). It has not, however, answered the question of whether the tribal suit

provision is severable from the remaining remedy provisions of IGRA, nor does it directly address the proper interpretation of those provisions in the absence of the tribal suit provision.

The severability and remedies questions are fairly subsumed within the original Question (2(e)) here presented by Petitioner State of Oklahoma. They are, moreover, squarely presented in the cross-petition filed by the State of Florida in No. 94-219, *Florida v. Seminole Tribe*, also currently pending before this Court. Direct and immediate answers to these questions will greatly aid the lower courts in these and many other pending cases. Therefore, the Court ought either to grant review of that portion of Petitioner Oklahoma's petition here which raises those questions, or grant review of the State of Florida's cross-petition in *Florida v. Seminole Tribe*, and reserve decision on the State of Oklahoma's petition until the Court resolves the issues of severability and remedies in that case.

Whether the Court issues a limited grant of review here or grants review in *Florida v. Seminole Tribe*, it has already indirectly indicated the proper outcome by the reasoning of its decision in *Seminole Tribe v. Florida*, as the following discussion will show. Accordingly, it may be appropriate for the Court to issue a decision deciding the severability and remedy interpretation questions summarily, pursuant to Rule 16.1, rather than engaging in full briefing and argument.

PART I: SEVERABILITY

In the briefing of the issue before the Tenth Circuit, the Ponca Tribe of Oklahoma argued that should the court find that Congress' attempt to abrogate the States' Eleventh Amendment sovereign immunity was unconstitutional, then the Tenth Circuit was required by Supreme Court decision and the severability clause provided for in IGRA, 25 U.S.C. §2721, to sever the unconstitutional provisions from the act. Because the Tenth Circuit found that Congress had the power to abrogate the States' sovereign immunity, the Tenth Circuit did not address the Ponca Tribe's argument.

This Court considered the severability of constitutional and unconstitutional legislation in *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678 (1987). Therein, the Court stated:

> " '[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare and to maintain the act in so far as it is valid.' " [citations omitted]. The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.' [citations omitted].
>
> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the

> legislation is incapable of functioning independently. [citations omitted]."
> *Id.* at p. 684.

Congress has plenary authority over Indian affairs and Indian commerce. U.S. Const. art. I, §8, cl. 3; No. 94-12, Slip op. at 17. Recognizing that Indian gaming is a means for the Indian Tribes to promote economic development, self-sufficiency, and strong Tribal governments, Congress enacted IGRA to provide a statutory basis for the regulation of Indian gaming. 25 U.S.C. §2702. IGRA divides Indian gaming into three classes.[1] In order for an Indian Tribe to engage in Class III gaming, the Tribe must first attempt to enter into a gaming compact with the State in which it intends to conduct Class III gaming. 25 U.S.C. §2710(d)(1). However, although requiring the Tribe to seek to enter into a Class III gaming compact, Congress clearly did not intend that the States have a veto power over Indian gaming. Rather, if the Tribe and the State were unable to enter into a compact within 180 days of the date the Tribe first requested the State to enter into negotiations for a Class III gaming compact, Congress provided the Tribe with a remedy through filing a lawsuit against the State in the U.S. District Court. 25 U.S.C. §2710(d)(7)(A) and (B)(i). After the filing of the lawsuit, should the District Court determine the State had failed to negotiate in good faith with the Tribe for a Class III

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[1] Although Class III gaming is defined in IGRA as all forms of gaming that are not Class I or Class II gaming, 25 U.S.C. §2703(8), it is recognized that Class III gaming includes banking card games, casino type games and slot machines. No. 94-12, Slip op. at 2.

gaming compact, IGRA established a process finally resulting in the Tribe obtaining such a compact upon submission of a compact to, and approval by, the Secretary of the Interior. 25 U.S.C. §2710(d)(7)(B)(ii)-(D).

The State of Oklahoma's petition for a writ of certiorari requested this Court to review and reverse the Tenth Circuit's decision upholding Congress' power to abrogate the States' Eleventh Amendment sovereign immunity. This Court's decision in *Seminole Tribe* will likely reverse the Tenth Circuit's decision in *Ponca Tribe of Oklahoma*. In such case, pursuant to the severability clause in IGRA and the decision in *Brock*, this Court has the duty to sever the unconstitutional provisions of IGRA from the remainder of the act. Accordingly, Respondent Ponca Tribe respectfully submits this Court has two options:

1. To find that the provision for the States' involvement with Tribal Class III gaming is so inextricably interwoven with the Tribe's sole remedy under IGRA through suing the States in U.S. District Court that the provisions of IGRA relating to Class III gaming are entirely unconstitutional and to sever the Class III gaming provisions from the act. In regards to Class III gaming, the Tribes would be subject to the regulatory scheme that existed prior to the enactment of IGRA; or

2. Recognizing that if a State refused to negotiate in good faith with a Tribe for a Class III gaming compact and, after being sued by the Tribe in U.S. District Court, should the State continue to refuse to participate in the process, Congress provided in IGRA for the Tribe to obtain a Class III gaming compact by submitting

a compact to and having it approved by the Secretary of the Interior; to find that the provisions of IGRA relating to the participation of the States in Class III gaming are unconstitutional and to allow the Tribes to submit to, and obtain a Class III gaming compact upon approval by, the Secretary of the Interior.

PART II: THE SECRETARIAL REMEDY

In *Seminole Tribe,* this Court refused to apply the doctrine of *Ex parte Young* to enforce a Tribe's statutory right by a suit against a state officer because the Court found that Congress had prescribed a detailed remedial scheme for the enforcement of the Tribe's right to negotiate a compact. No. 94-12, Slip op. at 29-30. The Court found the end result of that scheme to be a "quite modest set of sanctions." *Id.,* at 30. If a State (a) refuses to negotiate in good faith, (b) refuses to conclude a compact within a 60-day period ordered by the court, and (c) refuses to accept the compact chosen by a mediator, the matter simply moves out of court and the Secretary of the Interior must prescribe procedures for Class III gaming by the Tribe. 25 U.S.C. §2710(d)(7)(B)(vii) (the "Secretarial Remedy").

Congress clearly has the authority to empower the Secretary to prescribe procedures governing Class III gaming on Tribal lands.[2] The Secretarial Remedy operates

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[2] "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some

independently of the flawed provisions of IGRA and also provides the ultimate remedy enacted by Congress. Even under the flawed provisions of the statute, if a State refuses to conclude a compact or to accept the mediator's decision, the matter goes to the Secretary and the court's remedial role ends.[3] The procedures are promulgated by the Secretary; they are not ordered by the court. The court does not dictate, instruct or in any way control the Secretary's promulgation of procedures. Instead, the Secretary is guided by the compact selected by the mediator, the provisions of IGRA and relevant provisions of the laws of the State. 25 U.S.C. §2710(d)(7)(B)(vii). If a State chooses to assert its Eleventh Amendment immunity against suit by a Tribe, that action should be construed to operate in the same manner as refusals at (a), (b) and (c), above under the statutory scheme – creating an impasse which can only be resolved by the Secretary. Operation of the Secretarial Remedy in these circumstances would subject the State to the same "modest set of sanctions" and relief

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authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." No. 94-12, Slip op. at 17. The Department of the Interior promulgated guidelines for gaming both before and after the passage of IGRA, *See e.g.*, Ross Swimmer, Assistant Secretary for Indian Affairs, *Review of Bingo Management Contracts*, U.S. Dept. of Int. Memorandum (April 7, 1986); Ross Swimmer, Assistant Secretary for Indian Affairs, *Indian Gaming*, U. S. Dept. of Int. Memorandum (March 6, 1992).

[3] The Court recognized that the court's involvement *before* the Secretarial stage is very limited and the "only remedy" in which the court is involved is issuance of an order directing the State and the Tribe to conclude a compact within 60 days. No. 94-12, Slip op. at 30.

expressly contemplated by Congress. Alternatively, a State could consent to the jurisdiction of a federal court in a suit brought by a Tribe. The State has the power to choose the remedy.

Respondent Ponca Tribe respectfully submits that the Court has already implicitly found that the Secretarial Remedy survives; if it does not, the reasoning and thus the justification cited by the Court in declining to apply *Ex parte Young* would not exist. "Where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." No. 94-12, Slip op. at 29. If the Secretarial Remedy were not available, then the remedial scheme referred to by the Court would not, in fact, exist, and the Court's justification for declining to apply *Ex parte Young* would be illusory.

The Court has encouraged interpretation of constitutionally defective statutes in a manner which provides simple and equitable results. *Califano v. Westcott*, 443 U.S. 76, 93 (1979). The federal courts may draw from their broad powers in equity in fashioning the remedy. *Id.* Preservation of the Secretarial Remedy – which Congress has already expressly included in IGRA – requires only the recognition that, if a State refuses to consent to suit under the Eleventh Amendment, the Secretarial Remedy is available to a Tribe and is not dependent upon a consensual suit. This is exactly what the Eleventh Circuit decided in the decision of which the State of Florida seeks review in its cross-petition:

> "Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and *the tribe, pursuant to 25 U.S.C. §2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state.* (emphasis added). The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02."
> *Seminole Tribe*, 11 F.3d at 1029.

By preserving the Secretarial Remedy and affirming the Eleventh Circuit's decision in *Seminole Tribe*, this Court engages in the least intrusive judicial action and does not disturb the remedy Congress expressly enacted.

CONCLUSION

For all the foregoing reasons, this Court should now grant review of the State of Oklahoma's petition, limited to the questions of severability and remedy as discussed above. Alternatively, the Court should grant review of the State of Florida's cross-petition in *Florida v. Seminole Tribe*, No. 94-219, and withhold decision in the instant matter, pending resolution of that case. In either event, inasmuch as the recent decision in *Seminole Tribe v. Florida* foreshadows the answer to the severability and remedy questions, the Court may wish to answer them through a summary disposition pursuant to Rule 16.1.

Respectfully submitted,

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